Sri Hartamas Development Sdn Bhd v MBF Finance Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-274-91
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND GUNN CHIT TUAN SCJJ
30 JANUARY 1992

Companies and Corporations *— Winding-up — Statutory demand — Presumption of insolvency — Whether statutory demand invalid — Rebutting statutory presumption of insolvency — Test to be applied — Companies Act 1965 s 218(2)(a)*

On 12 July 1988, the respondents obtained judgment against the appellants for the sum of $5,197,060.82 together with interest and costs. By a letter dated 24 December 1988, the respondents sent to the appellants a demand under s 218(2)(a) of the Companies Act 1965. The demand was served on the appellants on 27 December 1988. As the appellants failed to pay the debt demanded, the respondents presented a petition dated 17 January 1980 to wind up the appellants on the ground that having failed to comply with a statutory demand, the appellants were therefore presumed insolvent and unable to pay their debts. This was granted in the High Court and the appellants appealed.

The appellants contended firstly, that the statutory demand was bad as they were not given the statutory three weeks but instead a shorter time to comply with the demand. It was argued that since the demand was invalid, the presumption of insolvency did not arise. Secondly, it was contended that the learned judge below had applied the wrong legal test when he concluded that the appellants had not rebutted the statutory presumption. In particular, it was contended that the correct test should be whether the appellants would be capable, if necessary, of paying all its debts by a realization of its assets, including any immovable property.

Held, dismissing the appeal:

(1) Although the demand in writing need not be in any special form, it must strictly comply with the requirements of s 218(2)(a) of the Companies Act 1965. The whole purpose of the demand is to warn the debtor of an impending petition.

(2) The demand in this case was not bad or invalid. It was made in writing and was signed and delivered at the registered address of the appellants and it had specified the actual amount due.

(3) The presumption of inability to pay its debts only arises if the requirements of the section relating to the demand have been complied with and the company has for three weeks after service of the demand neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

(4) Although the respondent has stated incorrectly in the notice of demand that the debt must be paid within 21 days from the date

of the notice, that does not affect the validity of the demand to pay the sum due. The three weeks in the section refer to the neglect to pay before the presumption of inability to pay debts arises under the section and is not a requirement relating to the notice of demand itself.

(5) The presumption of insolvency arises when the requirements of s 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts. If the company does not have assets available to meet its current liabilities it is commercially insolvent and may be wound up.

Per curiam: Although the amount due was not in dispute in this case, the court would nevertheless take this opportunity here to agree with Zakaria Yatim J [in *Perusahaan Jenwatt Sdn Bhd*[3]] that a demand does not fall within s 218(2)(a) of the Act if the amount demanded exceeds the sum actually due.

[Bahasa Malaysia summary

Di dalam kes ini responden telah mendapat penghakiman terhadap perayu untuk jumlah $5,197,060.82 bersama bunga dan kos. Responden telah mengirim kepada perayu surat tuntutan di bawah s 218(2) Akta Syarikat 1965. Oleh kerana perayu gagal membayar hutang yang dituntut, responden telah mengemukakan petisyen untuk menggulung perayu. Ini telah dibenarkan oleh Mahkamah Tinggi dan perayu telah merayu.

Diputuskan, menolak rayuan:

(1) Sungguhpun tuntutan bertulis itu tidak semestinya dibuat di dalam bentuk khas, ia hendaklah patuh ketat kepada kehendak-kehendak s 218(2)(a) Akta Syarikat 1965. Tujuan keseluruhannya tuntutan itu ialah memberi amaran kepada penghutang mengenai petisyen yang akan dikemukakan.

(2) Tuntutan di dalam kes ini tidaklah kurang baik atau tak sah. Ia telah ditulis dan ditandatangani dan telah disampaikan kepada alamat berdaftar perayu dan telah menyebutkan jumlah yang sebenar kena dibayar.

(3) Anggapan tidak berdaya membayar hutang hanya timbul jika kehendak seksyen itu berhubung dengan tuntutan itu telah dipatuhi dan syarikat itu telah dalam tempoh tiga minggu dari penyampaian tuntutan itu mengabaikan membayar hutang itu akan mencagarnya atau mengkompaunkan supaya memuaskan pemiutang.

(4) Sunguhpun responden telah silap menyebutkan di dalam notis tuntutan bahawa hutang itu hendaklah dibayar dalam masa dua puluh hari dari tarikh notis itu, ini tidak menyentuh sahnya tuntutan membayar jumlah yang terhutang. Sebutan tiga minggu di dalam seksyen itu merujuk kepada kecuaian membayar sebelum anggapan tidak berdaya membayar hutang timbul di bawah seksyen itu dan bukan menjadi syarat berhubung dengan notis tuntutan itu.

A (5) Anggapan ketaksolevan timbul apabila kehendak-kehendak s 218(2)(a) Akta itu dipatuhi dan terpulanglah kepada syarikat itu membuktikan ia boleh membayar hutang-hutangnya. Jika syarikat itu tidak mempunyai aset yang boleh digunakan untuk liabiliti semasanya ia adalah tak solven dari segi perdagangan dan boleh digulungkan.]

B

Notes

For cases on s 218(2) Companies Act 1965, see 3 *Mallal's Digest* (4th Ed) paras 251, 253, 255, 257–259. For cases on s 218(2) Companies Act (Cap 185) [Sing], see 3 *Mallal's Digest* (4th Ed) paras 250, 252, C 254.

Cases referred to

1 *Re Yap Kim Kee & Sons Sdn Bhd* [1990] 2 MLJ 108 (folld)
2 *Bateman Television Ltd v Coleridge Finance Co Ltd* [1969] NZLR 794 (folld)
D 3 *Re Perusahaan Jenwatt Sdn Bhd* [1990] 2 MLJ 178 (folld)
4 *Re Willes Trading Pty Ltd* (1978) 3 ACLR 582 (refd)
5 *Re Ataxtin Pty Ltd v Gordon Pacific Developments Pty Ltd* (1991) 9 ACLC 865 (refd)
6 *Parry & Co Ltd v India Machinery Stores (P) Ltd* (1979) 49 E Company Cases 21 (refd)
7 *Re Catholic Publishing and Bookselling Co* 33 LJ (Ch) 325 (folld)
8 *Re Lympne Investments Ltd* [1972] 1 WLR 523 (folld)
9 *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53 (folld)
10 *Re Great Eastern Hotel Pte Ltd* [1989] 1 MLJ 161 (distd)
F 11 *Imperial Hydropathic Hotel Co Ltd v Hampson* 49 LT 147 (refd)
12 *Re Keiran Byrne & Associates Geotechnical Consultants Pty Ltd* (1987) 12 ACLR 367 (refd)
13 *William Jacks & Co (M) Sdn Bhd* v *Chemquip (M) Sdn Bhd* [1991] 2 MLJ 555 (refd)

G

Legislation referred to

Companies Act 1965 s 218(2)(a)

Appeal from: Companies Winding-up No D4–28–28–89 (High Court, Kuala Lumpur)

H

G Sri Ram and *MS Murthi* (*Murthi & Partners*) for the appellants.
Loh Siew Cheang, *Ranjit Singh* and *Aggie Chew* (*Cheang & Ariff*) for the respondents.

I **Gunn Chit Tuan SCJ** (delivering the judgment of the court): On 12 July 1988, MBF Finance Bhd (hereinafter referred to as 'the respondents') obtained judgment in the High Court at Kuala Lumpur against Sri Hartamas Development Sdn Bhd (hereinafter referred to as 'the appellants') for the sum of $5,197,060.82 together with interest and costs. By a letter dated 24

December 1988, the respondents sent to the appellants a demand under s 218(2)(a) of the Companies Act 1965 (hereinafter referred to as 'the Act'), which reads as follows:

> Statutory demand pursuant to s 218 of the Companies Act 1965 (Act 125) for payment of a debt
>
> To: Sri-Hartamas Development Sdn Bhd
> 3rd floor
> Wisma Low Kim Her
> 225–227 Jalan Tun Sambanthan
> 50470 Kuala Lumpur
>
> Take Notice that, We, Messrs Cheang & Ariff of 18th Floor, Plaza MBf, Jalan Ampang, 50450 Kuala Lumpur, solicitors for MBf Finance Bhd hereby require you to pay to us the principal sum due on a final judgment dated 12 July 1988 obtained by MBf Finance Bhd against you in the High Court at Kuala Lumpur in Civil Suit No D4–23–2067–87 that is to say the sum of M$5,197,060.82 together with interest thereon at the rate of 17% pa from 1 December 1986 until the date of realization and cost at M$400 whereon execution has not been stayed or you must secure or compound for the aforesaid sum to the satisfaction of the said MBf Finance Bhd within 21 days of the date hereof and that the consequences of not complying with the requisition of this notice are that winding up proceedings may be taken against you.
>
> Dated 24 December 1988.
>
> Sgd Messrs Cheang & Ariff
> Solicitors for MBf Finance Bhd

That demand was served on the appellants on 27 December 1988. As the appellants failed to pay the debt as demanded, the respondents on 19 January 1989 presented a petition dated 17 January 1989, to wind up the appellants on the ground that the appellants had failed to comply with a statutory demand and was therefore insolvent and unable to pay its debt. At the hearing in the High Court before Zakaria Yatim J, several grounds were raised to resist the said petition. None of them found favour with the learned judge who, after hearing arguments, ordered the appellants to be wound up.

On appeal to us, Mr G Sri Ram, leading counsel for the appellants, contended firstly that the appellants ought not to have been wound up because the statutory demand did not comply with the terms of s 218(2)(a) of the Act, which is as follows:

> A company shall be deemed to be unable to pay its debts if
> (a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding five hundred dollars then due has served on the company by leaving at the registered office a demand under his hand or under the hand of his agent thereunto lawfully authorized requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.

Counsel contended that the demand was bad because under s 218(2)(a), a company is by law entitled to have three weeks after service of the demand

A to either pay, secure or compound the sum demanded. He further submitted that a creditor is not entitled to truncate that right conferred by statute which requires strict compliance, and stated that the appellants recognized the seriousness of the ensuing consequences as a presumption of insolvency arises upon a failure to meet the demand. In his written submission, counsel relied on *Re Yap Kim Kee & Sons Sdn Bhd*,[1] in which case the High B Court had held, inter alia, that although the demand in writing need not be in special form, it must comply strictly with the requirements of s 218(2)(a). Here we would agree with Zakaria Yatim J in that case that the demand in writing need not be in any special form as stated in *Palmer's Company Precedents* (17th Ed) at p 26. The demand need not use the word 'demand' C and a peremptory 'request' or 'call' for payment would suffice. We would also agree with Zakaria Yatim J who cited and followed *Bateman Television Ltd v Coleridge Finance Co Ltd*,[2] in which case it was pointed out [at p 803] that the whole purpose of a demand is to warn the debtor of an impending petition.

D Although the amount stated in the notice of demand in this case was not in dispute, counsel for the appellants in his written submission also cited *Re Perusahaan Jenwatt Sdn Bhd*,[3] in which case Zakaria Yatim J held, inter alia, that the notice of demand must comply strictly with the requirements of s 218(2)(a) of the Act. In that case, his Lordship held that the notice of demand had not complied strictly with the requirements of s 218(2)(a) E because the amount stated in the said notice was far in excess of the debt due and the failure on the part of the company to pay the sum claimed did not mean that the company was unable to pay its debts. The High Court therefore held that the notice of demand was bad and that the court could not presume that the company was unable to pay its debts. We note that Zakaria Yatim J has in that case reiterated [at pp 179–180] what he has F stated in the earlier case of *Re Yap Kim Kee & Sons Sdn Bhd*[1] regarding the 'statutory demand'.

Counsel also relied on the Australian case of *Re Willes Trading Pty Ltd*,[4] in which case Needham J of the Supreme Court of New South Wales held, inter alia, that in order to attract the deemed insolvency advantages of G s 222(2)(a) of the Companies Act 1961 (New South Wales) (which is in pari materia with our s 218(2)(a) of the Act), there must be strict compliance with that section. But counsel also referred us to *Re Ataxtin Pty Ltd v Gordon Pacific Developments Pty Ltd*[5] and pointed out that it was stated by Heerey J in the Federal Court of Australia recently that there are conflicting authorities in Australia concerning the validity of a demand which over- H states the amount due. As stated above, although the amount due was not in dispute in this case, we would nevertheless take this opportunity here to agree with Zakaria Yatim J that a demand does not fall within s 218(2)(a) of the Act if the amount demanded exceeds the sum actually due.

Lastly, Mr Sri Ram referred us to the Indian case of *Parry & Co Ltd v* I *India Machinery Stores (P) Ltd*,[6] in which the Patna High Court held, inter alia, that the winding-up of the company could not be allowed if the company had neglected to pay a part of the debt. In that case, the notice of demand under s 434(a) of the Indian Companies Act 1956 (which is in pari materia with s 218(2)(a) of our Companies Act) had been superseded by a

letter written on 13 December 1976. It was also held by the Indian court that as only a fortnight's time was allowed by that letter to the company to pay the dues which was against the statutory period allowed under the said s 434, it could not be contended that the winding-up proceeding should be maintained on the basis of that letter. Counsel pointed out that the statutory demand in our present case gave the appellants 21 days from the date of the notice, ie 24 December 1988, and not 21 days after receipt by the appellants. He contended that since the demand was received by the appellants only on 27 December 1988, the appellants were not given the statutory three weeks but instead a shorter period to comply with the demand. He therefore submitted that that vitiated the demand. He also reasoned that since the demand was invalid, the presumption of insolvency did not arise and as the petition was based on a defective or invalid demand, a winding-up order on a presumptive basis ought not to have been made, and the learned judge ought to have dismissed the petition on that ground. Counsel stated that the learned judge did not deal with the question of the 21 days' notice because counsel for the appellants in the court below had conceded that point which was not quite correct. He therefore suggested that the case might be remitted back to the High Court for a ruling to be made on that point.

It must be pointed out that the petition in this case was presented more than two years ago and we would therefore now state that we consider that the demand was not bad or invalid. It was made in writing and was signed and delivered by the respondents' authorized agent at the appellants' registered address and it has specified the actual sum due which was not disputed. Section 218(2)(a) of the Act only provides that a demand under the hand of a creditor or under the hand of his agent lawfully authorized must be served on the company by leaving the said document at its registered address requiring the company to pay the sum due. The presumption of inability to pay its debts only arises if the requirements of the section relating to the demand have been complied with, and the company has for three weeks after service of the demand neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor. In other words, the three weeks refer to the period of neglect to pay before the said presumption of inability to pay debts arises under the said section, and is not a requirement relating to the notice of demand itself. In this case, the respondents stated incorrectly in the notice of demand that the debt must be paid within 21 days of the date of the notice, but that in our view would not affect the validity of the demand to pay the sum due or was non-compliance with the requirements of s 218(2)(a) of the Act. There would have been compliance with s 218(2)(a) of the Act if the interval between the day when the notice becomes effective and the presentation of the petition is, as in this case, 21 full days. (See *Re Catholic Publishing and Bookselling Co*[7] and *Re Lympne Investments Ltd.*[8])

As an alternative ground regarding insolvency, it was contended by Mr Sri Ram that the learned judge had applied the wrong legal test when he concluded that the appellants had not rebutted the statutory presumption and was therefore insolvent. Counsel said that in the court below the appellants had led evidence to show that it is the owner of landed assets

worth more than $500m. The respondents did not dispute those facts in the court below and there was therefore no challenge on that point. Nevertheless, the learned judge relied on the decision of the Privy Council in *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd*,[9] which held that the appellants had failed to show that it was not insolvent. Counsel submitted that the correct test would be met by answering a question: 'Would the appellants be capable, if necessary, of paying all its debts by a realization of its assets, including any immovable property, and of carrying on some other business if its shareholders so wished out of the net amount realized after payment of all liabilities?' It was further submitted that it was no part of the test that a company should have the capability to meet its liabilities out of its own moneys, and in support of that submission, the appellants relied on the decision of the Singapore High Court in *Re Great Eastern Hotel (Pte) Ltd*.[10]

It was also submitted by counsel that the *Malayan Plant* case[9] is distinguishable from our present case in that in the *Malayan Plant* case,[9] the appellant did not put its case on the same footing as the present appellants. It was not contended in that case that the 'quick assets' test did not apply because the company had large landed assets. All that was contended for was that it would be more beneficial to all creditors if there were no winding-up of *Malayan Plant (Pte) Ltd*.[9] Alternatively, it was also submitted on behalf of the appellants that if the Privy Council had laid down any general principles in that case to govern the test for insolvency, then to that extent its decision was wrong and the Supreme Court should not follow it.

Mr Loh Siew Cheang, leading counsel for the respondents, submitted that the *Great Eastern Hotel (Pte) Ltd* case[10] could be distinguished as it was a decision of the Singapore High Court under s 254(2)(c) of the Singapore Companies Act (Cap 185, 1970 Ed) which is similar to s 218(2)(c) of our Companies Act 1965, whereas in this case we were concerned with s 218(2)(a) of the Act. He then referred us to the following passage in the judgment of Cotton LJ in *Imperial Hydropathic Hotel Co Ltd v Hampson*[11] at p 150:

> As regards the right to have a winding-up order, the first question is whether here the company is to be deemed unable to pay its debts. It was argued that we must be satisfied judicially that the company was in fact insolvent; but that is not what the Act of Parliament requires, as I understand it. Section 80 requires the court to treat the company as if it were insolvent within the meaning of the previous section — that is, unable to pay its debts if certain things are done — and the question we have therefore to consider is not whether we are satisfied on the evidence before us that the company is insolvent, but whether an event has happened, on the happening of which the Act of Parliament requires us to deem it insolvent — that is, to treat it as insolvent. The words are, 'A company under this Act shall be deemed to be unable to pay its debts' when certain things happen. Now, the question here is, whether the company neglected for the statutory period to pay a debt which is now shown to be due; and, in my opinion, it did.

We ourselves have noticed that the Privy Council case of *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd*[9] was not referred to during arguments by the two Queen's Counsel who appeared before the Singapore

High Court in the *Great Eastern Hotel (Pte) Ltd* case[10] for the reason that that case was concerned with s 254(2)(c) of the Singapore Companies Act, and there is therefore no need for us to consider the two tests for insolvency referred to by the learned judicial commissioner in the Singapore case because under s 218(2)(a) of the Act, it is not necessary as in a case of a petition under s 218(2)(c) of the Act for the petitioner to prove to the satisfaction of the court that a company is unable to pay its debts or for the court in determining whether a company is unable to pay its debts, to take into account the contingent and prospective liabilities of the company. In this case, the presumption of insolvency arises when the requirements of s 218(2)(a) of the Act have been satisfied and it is for the company to prove that it is able to pay its debts. In dealing with 'commercial insolvency', that is, of a company being unable to meet current demands upon it, we would respectfully follow the Privy Council in the *Malayan Plant* case[9] and cite the following observations from *Buckley on the Companies Act* (13th Ed) at p 460:

> In such a case it is useless to say that if its assets are realized there will be ample to pay twenty shillings in the pound: this is not the test. A company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up.

Applying the test in the above-quoted observations, we therefore held that the learned judge had exercised his discretion correctly in ordering the appellant to be wound up.

Mr MS Murthi, the other counsel for the appellants, after referring to that part of the learned judge's grounds of judgment on the authority of one Song Soon Ong to instruct Messrs Cheang & Ariff to issue the notice of demand, stated that his authority was limited to $750,000 relating to credit including leasing and hire-purchase up to the authorized limit of $300,000. He contended that the learned judge was wrong to hold that the recital clause in Mr Song's power of attorney gave him unlimited authority. Counsel then referred to *Re Kieran Byrne & Associates Geotechnical Consultants Pty Ltd*,[12] in which case the Supreme Court of Queensland held, in a judgment delivered by Ryan J, that as there was no evidence that the applicant gave authority to its solicitors to sign the demand under s 364(2)(a) of the Companies (Qld) Code, the demand was defective and a winding-up order could not be founded upon it. Mr Murthi then stated that Mr Song Soon Ong's authority was limited and that there was no evidence in writing that he was so authorized by the respondents to instruct the solicitors to issue the notice of demand.

Counsel also contended that the power of attorney granted to Mr Song could not be extended by a document not under seal and merely extended, and the instruction to solicitors to act in the matter was ultra vires. Therefore the notice under s 218 was bad, and the statutory presumption could not arise; the respondents had no cause of action to present the petition.

Mr Loh, however, contended that it was irrelevant to consider the authority of the solicitors to issue the notice of demand in this case as Mr

A Murthi in his arguments had assumed that the solicitors were employed by Mr Song who was only an employee of the respondents. He stated that the factual errors in Mr Murthi's arguments were that Mr Song did not sign the notice which was signed by the solicitors on behalf of the respondents. The notice itself has clearly stated that Messrs Cheang & Ariff were solicitors for the respondents, which are the petitioners, and in none of the affidavits B affirmed by Mr Song did he say that he had acted under the power of attorney granted to him by the respondents, nor did Mr Song in any of his affidavits state that his acts in this case were his personal acts and not acts on behalf of his employers, the respondents. Counsel contended that the learned judge had looked at the entire chain of evidence, and in his grounds C of judgment at p 22 of the supplementary appeal records, had stated that whatever written instruction Mr Song had received from the respondents was an internal matter within the company. His Lordship also referred to Mr Song's affidavit affirmed on 12 June 1991, in which he had stated that 'the petition and all affidavits were filed by or for and on behalf of the petitioners. ... All the affidavits on behalf of the petitioner have been issued D or undertaken, or made with and under the petitioner's authority.' Mr Song has also confirmed that the notice issued under s 218 of the Companies Act 1965, including the petition itself which is signed by the petitioners' solicitors for and on behalf of the petitioners, were acts which have been undertaken with and under the authority of the petitioners. His Lordship E accepted the averment of Mr Song that the notice of demand was issued by Messrs Cheang & Ariff with the authority of the respondents.

This court has recently pointed out in *William Jacks & Co (M) Sdn Bhd v Chemquip (M) Sdn Bhd*[13] that where there is no evidence that there is no action properly before the court, it could determine the issue of want of authority of a solicitor on an application by motion or summons. However, F in this case the learned judge has dealt with this issue during the hearing and we would agree with him that there was ample evidence in this case to show that Messrs Cheang & Ariff were lawfully authorized to act on behalf of the respondents. We agreed with Mr Loh that the submissions of Mr Murthi on Mr Song's authority and his power of attorney as well as the G authority of the solicitors to issue the notice of demand were irrelevant to the issue before the court. We therefore ordered that the appeal be dismissed with costs and that the deposit be paid to the respondents on account of taxed costs.

Appeal dismissed.

H

Reported by Prof Ahmad Ibrahim

I